90-1048

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ALEXANDER MALICK,
Petitioner,

vs.

SANDIA CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

ALEXANDER W. MALICK
13 Buckeye Lane
Danville, CA 94526
(415) 837-6781
Petitioner-Pro se

QUESTION PRESENTED

The question presented for review is:

Whether summary judgment granted pursuant to Federal Rule of Civil Procedure 56 unconstitutionally denies the Seventh Amendment right of trial by jury.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner Alexander W. Malick respectfully prays that a writ of certiorari issue to review the order and memorandum of the Ninth Circuit Court of Appeals, entered on September 24, 1990.

OPINION BELOW

An independent action in equity to vacate summary judgment in the underlying action was dismissed by the District Court. The memorandum of the Ninth Circuit Court of Appeals affirming the dismissal, de novo, and ruling that summary judgment does not violate the Seventh Amendment, is set out in the Appendix.

JURISDICTION

Judgment of the Ninth Circuit Court of Appeals was entered on September 24, 1990. The petition for a writ of certiorari is filed within ninety (90) days of that date. The court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE OF COURT INVOLVED

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the United States, then according to the rules of the common law.

United States Constitution, Amendment 7

---The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.---

Federal Rule Civil Procedure 56(c)

STATEMENT OF THE CASE

The jurisdiction of the district court in the original and underlying action (N.D. Cal. No. C-83-4836RHS) was invoked under 28 U.S.C. 1332(a) because of diversity of citizenship, the plaintiff, Malick, being a citizen of California, the defendant, Sandia, incorporated in Delaware and the amount in controversy exceeding $10,000.00.

This petition arises from the dismissal of an independent action in equity (N.D. Cal. No. 89-2765 WWS), to vacate summary judgment for the extrinsic mistakes of the lack of federal question jurisdiction and, the unconstitutional denial of the right of trial by jury.

In the underlying action damages were sought as measured by employee benefits denied to the plaintiff, Malick, because he was fraudulently designated an independent contractor instead of an employee by his employer, the defendant, Sandia. A consequence of the denial was that Malick was never a participant or beneficiary of an employee benefit plan, a necessary condition for ERISA[1] federal question jurisdiction, (29 U.S.C.

[1] ERISA - Employee retirement Income security Act.

1002(7), 29 U.S.C. 1132(a)(1)(B)). The district court granted summary judgment on ERISA grounds and the appellate court affirmed de novo on separate ERISA grounds, (9th Cir. No. 85-2299 unreported) deferring to the decision of ERISA trustees composed of Sandia employees. The court ruled that Malick was not entitled to relief under federal or state law concluding that "The committee of (ERISA) trustees did not act arbitrarily or capriciously." No state law grounds were given.

The district court dismissed the independent action on grounds of res judicata and law of the case without addressing the constitutional issue. (Oral hearing denied). The appellate court affirmed de novo (9th Cir. No. 89-16591 unreported) on grounds of res judicata (oral

hearing denied). The court added "A grant of summary judgment does not violate the Seventh Amendment right to a jury trial. (Citations) . . . ("the function of a jury is to try the material facts; where no such facts are in dispute, there is no occasion for jury trial. Thus, the right to trial by jury does not prevent a court from granting summary judgment.") (Appendix, p. A-7)

The court branded the appeal "frivolous" and granted sanctions.

REASONS FOR GRANTING THE PETITION

Summary Judgment Under Fed. Rule Civ. Proc. 56 Unconstitutionally Violates the Seventh Amendment Safeguard Against a Biased, Corrupt or Otherwise Oppressive Judge Interfering With or Obstructing the Common Law Right of Trial by Jury.

-A-

This petition presents a question of vital concern to litigants in the federal courts-whether

summary judgment pursuant to Fed. Rule Civ. Proc. 56 unconstitutionally denies the Seventh Amendment right of trial by jury.

Justices of this Court have noted how the Seventh Amendment guarantee has been diminished by judicial action. Galloway v. United States, 319 U.S., 372, 397 (1943) (Justice Black dissent), Colgrove v. Battin, 413 U.S. 149, 166 (1972) (Justices Marshall and Stewart dissent), Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339 (1978) (Justice Rehnquist dissent).

Judicial action in adopting Fed. Rule Civ. Proc. 56 and applying it, as in this case, has resulted in the outright violation of the Seventh Amendment guarantee of the right to trial by jury.

With the approaching bicentennial anniversary of the Bill of Rights on December 15, 1991, it is

appropriate to consider the constitutionality of Rule 56 in light of the intent and purpose of the Seventh Amendment in preserving the right of trial by jury.

-B-

By historical standards, summary judgment under Rule 56 violates the Seventh Amendment. Summary judgment is outside the ambit of the substantive common law procedures and practices contemplated by the amendment, when adopted in 1791, to preserve the values of trial by jury.

This Court has frequently ruled on the Seventh Amendment[2] and has held that the content of the right to trial by jury as expressly preserved by the Seventh Amendment, must be judged by historical

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[2] Schopler, Supreme Court's Construction of Seventh Amendment's Guarantee of Right to Trial by Jury, 40 L.Ed.2d 846 (1974).

standards,[3] and the right is that which existed under the English common law when the Amendment was adopted in 1791[4]. The court has further held that the aim of the Seventh Amendment is to preserve the substance of the common law right of trial by jury, as distinguished from matters of form and procedure, and to retain the common law distinction between the province of the court and that of the jury.[5] The Seventh Amendment requires that a common law

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[3] Curtis v. Loether, 415 U.S. 189, 193 (1974), Colgrove v. Battin, 413 U.S. 149, 155-156 (1973), Ross v. Bernhard, 396 U.S. 531, 533 (1970), Capital Traction Co. v. Hof, 174 U.S. 1, 8-9 (1899), Parsons v. Bedford, 3 Pet. 433, 446 (1830). See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339-346 (1978) (Justice Rehnquist dissent and history of Seventh Amendment).

[4] Baltimore and Carolina Line v. Redman, 295 U.S. 654, 657 (1935), Luria v. United States, 231 U.S. 9, 27-28 (1913), Thompson v., Utah, 170 U.S. 343 (1898).

[5] Baltimore and Carolina Line, supra at 657. Accord Colgrove v. Baltin, supra at 156-157, Galloway v. United States, 319 U.S. 372, 390 (1943), Gasoline Products Co. v. Champlin Refinery Co., 283 U.S. 494, 498 (1931).

suit be heard by a jury today if that same type of suit would have been heard by a jury in 1791.

Fundamental to suits at common law is the resolution of issues of fact by the jury and issues of law by the judge; "ad questionem facti non responden judices, ita ad questionem juris non respondent jurat."[6] How the issues of fact are established is determined at common law, not by the judge or jury, but by the pleading process. After the plaintiff's evidence is publicly heard before judge and jury, the judge may determine if factual issues are genuine, that is, whether reasonable minds could arrive at more than one conclusion from the evidence. These substantive common law procedures, developed over 600

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[6] Downman's Case, 9 Co. Rep. 13a, 77 Eng. Rep. 743 (K.B. 1585).

years, defined the province of judge and jury with the object of making the system of justice judge-proof and jury-proof.

Summary judgment pursuant to Fed. Rule Civ. Proc. 56 acts to contradict the purpose of the Seventh Amendment, the substantive common law procedures contemplated in the Amendment, and the rulings of this Court. Rule 56 grants a judge power to examine evidence of unseen affiants and deponents without benefit of a jury's presence, and to foreclose a jury trial by a discretionary decision that there is no "genuine" issue. Such evidence does not rise to common law standards. The Rule relies on deposition evidence obtained under unsupervised adversary conditions where the unrestrained character of a corrupt or over-zealous attorney can subvert the object of full

disclosure. Here the incentive of non-disclosure prevails to offer such an attorney a far better opportunity of winning a case, making more money and avoiding malpractice suits.[7]

In this case of fraud, neither party nor any witness was ever seen by a judge. Evidence by unseen witnesses is at odds with the common law which places great emphasis on the credibility of witnesses as determined by demeanor and cross examination. Many a glib liar has gone undetected in a deposition only to be exposed on the witness stand before a jury in the charged atmosphere of a courtroom. And many a crafty attorney, overbearing at a deposition but unctuous in a courtroom, has failed to "con" a jury.

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[7] Brazil, The Adversary Character of Civil Discovery: a Critique and Proposal for Change. 31 Vanderbilt Law Rev. 1295 (1978).

Rule 56 permits a judge to use partial evidence to determine the existence of factual issues. The procedure clashes with the common law. This Court has ruled before "Whether in a given case there is a right to a jury trial is to be determined by an inspection of the pleadings and not by an examination of the evidence."[8]

-C-

The principal value to be preserved by the Seventh Amendment is limiting the power of the government and its agents to interfere with the peoples' right to a trial by jury. The longstanding demand of the people for the right

[8] Slocum v. New York Life Ins. Co., 228 U.S. 364, 398 (1912).

of trial by jury,[9] expressed in the Seventh Amendment, was not because a jury was considered as simply a good thing, or that a judge was considered incapable of deciding factual issues, or the existence thereof. It was because judges were not trusted. The rights of the people were not to be subjected to harsh rules without regard to individual circumstances or to unjust laws without regard to the unjustness,[10] or to decisions arrived at systematically; rights were not to be subjected to judges who were biased,

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[9] See - Declaration of Rights, 1765 (Stamp Act Congress); Declaration of Rights, 1774 (Continental Congress); Declaration of Independence, 1776; State Constitution of Ten Original States, (Thorp); Proposals to Amend the Constitution by ten Ratifying States (Elliots Debates); Northwest Ordinance, 1787.

[10] See generally, Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. Law Rev. 639, 670-673, 745 (1973).

corrupt,[11] or otherwise oppressive or to the unfortunate judge who was eccentric or senile, or just worn out physically or spiritually.[12]

The anti-federalists were the driving force behind the Seventh Amendment. They objected to the constitution because there was no Bill of Rights to protect the individual from government excesses. The cardinal objection was the absence of the guarantee of trial by jury to guard against corrupt judges. Even their principal opponent, the leading federalist Alexander Hamilton said of trial

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[11] By 1962, at least 32 Federal judges have been subject to the extreme process of congressional investigation, impeachment proceedings or criminal action. See Borkin, The Corrupt Judge, (1962). This averages about one judge every five years, and the rate has not decreased.

[12] Federal judges up to the highest level have been found inept. Frankel, Removal of Judges: California Tackles an Old Problem, 49 A.B.A.J. 166 (1963).

by jury "The strongest argument in its favor is that it is a security against corruption."[13]

The danger of inept judges has been acknowledged by this Court in a Sixth Amendment criminal case and the due-process reasoning by Justice White applies to the same judge when presiding over a Seventh Amendment civil case, "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge . . . jury trial provisions . . . reflect . . . the reluctance to entrust plenary

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[13] The Federalist, No. 83 (1788), Modern Library Ed., p. 544-545.

powers over life and liberty of the citizen to a judge or group of judges."[14]

Justice Rehnquist has noted that "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign or it might be added, to that of the judiciary.[15] (emphasis added).

Justice Black has observed how judges are subject to temptation, "The plain fact is that this case illustrates that the summary judgment technique tempts judges to take over the jury

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[14] Duncan v. Louisiana, 391 U.S. 145, 156 (1967).

[15] Parklane Hosiery Co. v. Shore, supra at 343.

trial, thus depriving parties of their constitutional right to trial by jury."[16]

No better example of Justice Black's observation is this case where fraud was the central issue of the complaint. Yet, the appellate court in a de novo ruling, deferred to the decision of an administrative committee and affirmed summary judgment where neither the committee nor the court addressed the claim of fraud. Nor was either competent to do so without the benefit of examination of witnesses, which did not occur.

The Seventh Amendment limitation on the power of judges to interfere with the right of a trial by jury is subverted by Rule 56.

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[16] First National Bank v. Cities Services, 391 U.S. 253, 304 (1967) (dissenting opinion).

-D-

There is no authority supporting the proposition that summary judgment pursuant to Fed. Rule Civ. Proc. 56 is in accord with the Seventh Amendment.

This Court has stated in dictum "Fidelity and Deposit Co. v. United States, 187 U.S. 315, 319-321 (summary judgment does not violate the Seventh Amendment)."[17] The summary judgment referred to is not the general summary judgment pursuant to Fed. Rule Civ. Proc. 56.

The ruling in Fidelity was a default judgment in an action ex contractu where the defendant failed to show, in an affidavit supporting his plea, a good defense. The judgment was grounded on the common law device of striking a sham plea by

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[17] Parklane Hosiery Co. v. Shore, supra at 336.

a defendant made to delay proceedings. It was limited to actions ex contractu for money owed for a debt, liquidated damages, or a judgment. The procedure originated to satisfy the demand by merchants for quick debt collection and was absorbed by the common law when the law merchant fell into disuse.[18]

In Fidelity, this Court affirmed the default judgment of the Supreme Court of the District of Columbia[19] and upheld Rule 73 of the District of Columbia courts. "The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands." Fidelity

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[18] See generally, Bauman, The Evolution of the Summary Judgment Procedure, 31 Indiana Law J. 329 (1956).

[19] Now U.S. District Court for the District of Columbia.

at 320 (emphasis added). Fidelity relied on the authority of this Court's ruling, without opinion, in another typical debt collection case,[20] where the defendant's affidavit was insufficient under Rule 73. Rule 73 applies solely to actions ex contractu and requires an oath by affidavit accompanying the plea affirming the grounds for defense. As explained in the Rule[21] and the Fidelity ruling (at 198), the defendant's affidavit must state the grounds of defense, which if true, would be sufficient to defeat the plaintiff's claim. Nothing in Rule 73, or in the Fidelity decision, express or implied, suggests that a judge has the power in any type of case, to examine pre-trial evidence to

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[20] Smoot v. Rittenhouse, 27 Wash. Law Rep. 741 (1875).

[21] See Fidelity & Deposit Co. v. Unites States, 47 L.Ed. 194, 195 (1902).

determine the absence of a genuine issue of material fact and grant summary judgment to either party.

Fidelity serves as authority for summary judgment under Rule 73 of the District of Columbia, it does not serve as authority for the general summary judgment permitted unconstitutionally by Fed. Rule Civ. Proc. 56 and unknown at common law in 1791.

-E-

The background of Fed. Rule Civ. Proc. 56 reveals that summary judgment under the Rule violates the Seventh Amendment right of trial by jury.

Judge Charles E. Clark, judge of the U.S. Court of Appeals, Second Circuit and Dean of the Yale Law School was the reporter and member of the

Advisory Committee that devised the Federal Rules of Civil Procedure. It is apparent from Judge Clark's many publications[22] that his agenda was creating and promoting new rules of court, and at the top of the agenda was the summary judgment rule. Judge Clark is generally acknowledged as the father of summary judgment under Rule 56. "Mr. Clark . . . was probably responsible for the incorporation of this device in the suggested Federal Rules."[23] The snare of Rule 56 requires an understanding of the methodology

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[22] Including 38 Yale Law J. 423 (1928), 15 A.B.A.J. 82 (1929), 43 Yale Law J. 882 (1934), 2 F.R.D. 364 (1941), Code Pleading, 2d Ed. (1947), 3 Vanderbilt Law R. 493 (1950), 1 Syracuse Law R. 346 (1950), 36 Minn. Law R. 567 (1952).

[23] Johnson, Depositions, Discovery and Summary Judgments, Under the Proposed Uniform Federal Rules, 16 Texas Law R. 191, 200 note 28 (1937).

of Judge Clark and his group in promoting the rule.

According to Judge Clark, the summary judgment rule came into American procedure from the English practice by way of a New York rule.[24] The English practice was Keatings Act, enacted by Parliament, and entitled Summary Procedure on Bills of Exchange Act, (18 and 19 Victoria, c. 67, 1855). The New York rule was Rule 113 of the New York Rules of Civil Practice. Both the Act and the Rule established a summary judgment procedure for sham pleas of a defendant in limited actions ex contractu for debts. With reference to Rule 113, Judge Clark acknowledged that "The obvious difficulty was the constitutional

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[24] Clark, The Summary Judgment, 36 Minn. Law R. 567, 568, 569.

right of trial by jury, "but . . . the constitutionality of the procedure was established in New York . . ." citing two New York authorities.[25]

Hanna, at 514 makes clear that Rule 113 applied to a limited class of cases to recover debts and the constitutionality was grounded on the right to strike a defendant's sham plea in debt cases which right existed at common law in England "before our separation". (at 517 and 518). Hanna refers to similar rules declared constitutional; Rule 73 of the Supreme Court, District of Columbia (see Section D above). Rules 80 and 81 of the Supreme Court of New Jersey.[26] These rules require oaths by affidavit as to the

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[25] 36 Minn. Law R. supra at 568 note 5. Gen. Invest. Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923), Hanna v. Mitchell, 202 App. Div. 504, aff'd 235 N.Y. 534, 139 N.E. 724 (1923).

[26] Coykendall v. Robinson, 39 N.J.L. 98 (1876).

grounds for claims and defenses and do not call for pre-trial examination of evidence to preclude a jury trial. Here, Hanna at 516, refers to this Court's decision approving the requirement of an auditors report prior to trial in a dispute over a coal bill.[27] It was ruled that exploring evidence in advance of trial at a preliminary hearing does not infringe on the constitutional right of trial by jury; that the function of an auditors report is the same as that of pleading. And, "The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made."[28]

Judge Clark recognized the "striking difference" between the limited New York rule and the broad summary judgment under Rule 56, unrestricted as

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[27] Ex Parte Peterson, 253 U.S. 300, 309, 310 (1920).
[28] ibid at 311

to type of case and open to defendant as well as plaintiff. Judge Clark observed "But when we came to the drafting of the Federal Rules, we found a considerable view that these limitations were not justified in themselves and led to confusion and waste in determining their application. So the shackles were stricken off, and the states have followed this lead." (emphasis added) 36 Minn. Law Rev. at 569.

The shackles stricken off were the Seventh Amendment restraints on judges. The resulting Rule 56, then, initiated by a committee of lawyers and approved by judges became a judicial repeal of the Seventh Amendment safeguard against judges.

" . . . in the federal courts . . . there has developed a system of "buttonhole" pleading and

practice,. created, sponsored and supported by a select coterie of "big business" lawyers not at all responsive to the "common touch."[29]

In devising Rule 56, the intent and purpose of the Seventh Amendment was disregarded. The jury is there to temper formal legal rules with equity and the common sense of laypersons, and to be a safeguard against judicial bias, corruption and oppressive acts. There is no room here for a judge to examine pre-trial evidence without the presence of witnesses, decide the absence of genuine issues of material fact and thereby foreclose a jury trial.

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[29] Rothschild, The Jurisdiction of the Court of Appeals, 13 Brooklyn Law R. 14, 16-17 note (1947)

The background of Rule 56 condemns it as a violation of the Seventh Amendment right of trial by jury.

-F-

The pattern of summary judgment reversals in the appellate court exemplifies the use of Fed. Rule Civ. Proc. 56 by judges to deny the Seventh Amendment right of trial by jury.

Between January, 1979 and June, 1983, there were 1265 appeals of summary judgment in the Ninth Circuit, exceeding one appeal per court day. Of this number only 63 percent were affirmed; of the 583 unpublished dispositions, 78 percent were affirmed; and of 515 published opinions, only 52 percent were affirmed.[30]

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[30] Schwartzer, Summary Judgment Under Federal Rules, 99 F.R.D. 465, 467 note 9 (1984).

This is a dismal performance record of trial judges applying the drastic measures of Rule 56 to dispose of cases before they are tried. Reversal of summary judgment does not alter the fact that a constitutional right has already been denied. Nor does the right of appeal redeem a constitutional right denied to one who is without the financial or emotional resources to persevere. Summary judgment increases the appellate court caseload, unduly delays the right of trial by jury to successful appellants, and wholly denies that right to an unknown number of non-appealing litigants.

The pattern of summary judgment reversals confirms the violation of the Seventh Amendment by judges in applying Rule 56, and undermines

the public policy of maintaining the peoples confidence in the courts.

-G-

In this case, the unreasoned ruling supporting the constitutionality of summary judgment illustrates the oppressive enforcement of Fed. Rule Civ. Proc. 56 in denying the Seventh Amendment right of trial by jury.

The appellate court affirmed, de novo, dismissal of an independent action in equity and failed to present any logical reason why summary judgment pursuant to Rule 56, complies with the Seventh Amendment. The court relied on the reasoning of two other cases, neither of which serves as authority (see Appendix, p.A-7):

1. Sengupta - "The Constitution only requires that bona fide fact questions be submitted to a jury."

2. Plaisance - " . . . the function of a jury is to try the material facts; where no such facts are in dispute, there is no occasion for jury trial."

Each case relies on the common law standard that factual issues are decided by a jury, or conversely, that a jury decision is not required in the absence of a factual issue; Sengupta by its interpretation of the Constitution and Plaisance by a form of syllogism. That factual issues are for a jury has long been settled at common law (Downman's Case, note 6 above). The question before the court, however, is whether summary judgment unconstitutionally denied the Seventh Amendment right of trial by jury. The court has simply assumed as untrue the very question at issue. Begging the question does not comply with

Ninth Circuit Rule 36-1 requiring a written, reasoned disposition of a case."

The dismissal in this case[31] is a demonstration of the type of oppressive rulings elicited by Rule 56 in providing for the denial of the Seventh Amendment right of trial by jury.

CONCLUSION

For the reasons presented herein, summary judgment granted pursuant to Fed. Rule Civ. Proc. 56 is an unconstitutional violation of the Seventh

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[31] There is a certain unfairness in the handling of this dismissal which should not go entirely unnoticed by this Court in its supervisorial capacity. The district court ignored the constitutional question, denied an oral hearing, and threatened sanctions. The appellate court acted as a district court in addressing the question, de novo, denied an oral hearing, and granted sanctions. Yet, there was no opportunity to appeal this sole ruling on the question. Presumably a petition for rehearing offers some recourse. But the imposition of sanctions chills the process, intimidating with the spectre of unknown, additional sanctions.

Amendment right of trial by jury. Petitioner prays, therefore, that a writ of certiorari issue to review and reverse the decision of the Ninth Circuit Court of Appeals.

DATED: 12-22-90 Respectfully submitted,

Alexander W. Malick

ALEXANDER W. MALICK
Petitioner-Pro se

(Appendix follows)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 85-16591
D.C. No. CV-89-2765-WWS

Alexander W. Malick
Plaintiff-Appellant

v.

Sandia Corporation
Defendant-Appellee

MEMORANDUM*
[Filed Sept. 24, 1990]

Appeal for the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Submitted September 18, 1990**

Before: GOODWIN, Chief Judge, HUG, and
BEEZER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Malick's request for oral argument.

Alexander W. Malick appeals pro se the district court's order dismissing his action as barred on res judicata grounds. Malick's action sought to set aside the court's earlier grant of summary judgment in a diversity action for breach of contract and fraud against Sandia Corporation, his former employer. We have jurisdiction pursuant to 28 U.S.C. §1291 and affirm.

I.

Standard of Review

The district court's dismissal of an action on res judicata grounds is reviewed de novo. See Lea v. Republic Airlines, Inc., 903 F.2d 624, 634 (9th Cir. 1990). A party's entitlement to a jury trial in a federal court is a question of law reviewed de novo. See Standard Oil Co. of Calif. v. Arizona, 738 F.2d 1021, 1022-23 (9th Cir. 1984), cert. denied, 409 U.S. 1132 (1985).

II.

Merits

A. Res Judicata

Malick contends that the district court erred in finding that res judicata barred his action because exceptional circumstances created an "extrinsic

mistake" in this Court's decision affirming the district court's grant of summary judgment.[1]

"Federal Rule of Civil Procedure 60(b) provides that the rule 'does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.' Fed. R. Civ. P. 60(b). Thus, 'a federal court, in an independent action, has jurisdiction to modify a final judgment in a former proceeding on the ground of mistake . . . '" Narramore v. United States, 852 F.2d 485, 493 (9th Cir. 1988) (quoting West Virginia Oil & Gas v. George E. Breece Lumber Co., 213 F.2d 702,

[1]Malick also contends that the district court erred in applying the "law of the case" doctrine to this action because the action is separate and independent of the original suit. Because we find that the district court properly dismissed his action on res judicata grounds, we need not address this contention.

706 (5th Cir. 1954). Under the doctrine of res judicata, however, a final judgment bars further litigation by the same parties on the same cause of action. See Montana v. United States, 440 U.S. 147, 153 (1979); American Triticale, Inc. v. Nytco Serv., Inc., 664 F.2d 1136, 1146-47 (9th Cir. 1982) ("[a] judgment in a previous suit is conclusive in a second suit between the same parties or their privies on the same cause of action").

Here, Malick's action alleges that this Court committed an "extrinsic mistake" in affirming the district court's grant of summary judgment based on the Employee Retirement Income Security Act (ERISA), and not on the state law claims in his original complaint. This contention is without merit. In our amended memorandum affirming

the district court's grant of summary judgment, we explicitly found that all of Malick's "claims were properly dismissed [and that] Malick was not entitled to relief under either federal or state law." Malick v. Sandia Corp., No. 85-2299, amended unpublished memorandum at 3 (9th Cir. Nov. 13, 1986). Consequently, the district court's findings that our decision had reviewed and rejected Malick's state law claims was correct. Thus, the district court properly held that, absent any other grounds or evidence, it was barred from re-examining those same contentions.

B. Right to a Jury Trial

On appeal, Malick contends that the district court's grant of summary judgment pursuant to Fed. Rule Civ. Proc. 56 is unconstitutional because it deprives him of his Seventh Amendment right

to a jury trial. See Fed. R. Civ. P. 56. A grant of summary judgment does not violate the Seventh Amendment right to a jury trial. See Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1077-78 N.3 (9th Cir. 1986); see also Plaisance v. Phelps, 845 F.2d 107, 108 (5th Cir. 1988) ("[t]he function of a jury is to try the material facts; where no such facts are in dispute, there is no occasion for jury trial. Thus, the right to trial by jury does not prevent a court from granting summary judgment"). Therefore, this claim is wholly without merit.

III

Appellate Sanctions

Sandia Corp. requests sanctions against Malick for bringing this appeal. This Court has discretion to impose sanctions against litigants, even pro se,

for bringing a frivolous appeal. Fed. R. App. P. 38, 28 U.S.C. §1912; Wilcox v. Commissioner, 848 F.2d 1007, 1008-09 (9th Cir. 1988) ($1,500 sanction imposed on pro se litigant for bringing a frivolous appeal). An appeal is frivolous if the results are obvious, or the arguments of error are wholly without merit. Id. at 1009 (citation omitted).

Here, the district court warned Malick that his repetitive actions were sanctionable. Malick however, failed to heed the district court's warning. Malick's claims are wholly without merit; accordingly, we impose $500 damages as a sanction.

AFFIRMED.

(2)

No. 90-1048

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ALEXANDER MALICK,
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vs.

SANDIA CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should this Court review the constitutionality of the summary judgment procedure under the Seventh Amendment, where that issue was not raised in the underlying action (dismissed on summary judgment), and where the current action is barred by res judicata? [1]

[1] The parties are set forth in the title; respondent Sandia Corporation is a wholly-owned subsidiary of American Telephone & Telegraph Company ("AT&T"). The United States Department of Energy ("DOE") owns the facilities and all the assets of Sandia National Laboratories; pursuant to a prime contract between AT&T and the United States of America, Sandia Corporation (on behalf of DOE) operates said facilities as a no-fee, no profit contractor, and DOE assumes all costs and risks of such operations, including litigation.

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PROCEDURAL HISTORY AND CONTENTS OF APPENDIX

The following is an outline of the procedural history of this action and the related case which preceded it. All relevant orders are provided separately as the appendices to this opposition brief.

Malick I

1. *District Court*: Malick filed his original diversity action (N.D. Ca. Case No. C-83-4836) in October 1983. Summary judgment for Sandia initially was denied by Judge Schnacke but was granted on reconsideration in May 1985. Appendix A.

2. *District Court*: Malick's motion to alter or amend judgment was denied. Appendix B.

3. *Ninth Circuit*: Malick appealed to the Court of Appeals for the Ninth Circuit (Appellate Case No. 85-2299), which affirmed. Appendix C.

4. *Ninth Circuit*: Malick petitioned for rehearing. The Ninth Circuit denied the motion and amended its order. Appendix D.

5. *United States Supreme Court*: Malick filed a petition for writ of certiorari (Supreme Court Case No. 86-1293), which was denied. 480 U.S. 935 (1987). Appendix E.

6. *United States Supreme Court*: Malick petitioned for rehearing, and was denied. 481 U.S. 935 (1987). Appendix F.

7. *Ninth Circuit*: Malick filed a motion to recall mandate and to reconsider and set aside the order granting summary judgment on the theory of judicial error pursuant to Rule 60(b)(1). The Ninth Circuit denied this motion on September 4, 1987. Appendix G.

Malick II

1. *District Court*: Malick filed a subsequent independent action in equity to vacate summary judgment (on a theory of "extrinsic mistake" in *Malick I*) in July 1989. The complaint was dismissed by Judge Schwarzer on October 31, 1989, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on res judicata grounds, warning Malick of the potential for sanctions in the future. Appendix H.

9. *Ninth Circuit*: Malick appealed. The Court of Appeals affirmed on res judicata grounds, and noted that the constitutionality of the summary judgment procedure is well-established. Sanctions were awarded. Appendix I.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1048

ALEXANDER MALICK,

Petitioner,

vs.

SANDIA CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR NOT GRANTING CERTIORARI

The matters raised by Petitioner Alexander Malick ("Malick") are barred on the merits by the related doctrines of res judicata and law of the case; those doctrines provide a sufficient basis for rejecting the petition. The Court need not reach the abstract constitutional issue asserted which, in any event, is a long-settled question of law.

Malick I: Four years ago, in *Malick v. Sandia Corporation*, No. 86-1293 ("*Malick I*"), this Court denied a

petition for certiorari concerning the same summary judgment objected to in the current action. Rehearing also was denied. Malick returned to the Court of Appeals for the Ninth Circuit, seeking a recall of mandate, and was denied. Malick was not deterred.

Malick II: Almost two years after the last ruling in *Malick I*, Malick returned to the district court and revived the same contentions, styling the current action as an "independent action in equity to vacate summary judgment", in an attempt to distinguish it from *Malick I*. There is nothing "independent" about *Malick II*, however; the only difference is that the abstract constitutional challenge to summary judgment was added. Both the district court and the Ninth Circuit held that *Malick II* is barred by res judicata, in that it concerns precisely the same facts, parties and issues as are involved as in the underlying case. The Ninth Circuit observed:

> A judgment in a previous suit is conclusive in a second suit between the same parties or their privies on the same cause of action.

Appendix I at p. 23a, *quoting*, *American Triticale, Inc. v. Nytco Serv., Inc.*, 664 F. 2d 1136, 1146-47 (9th Cir. 1981) and *citing*, *Montana v. United States*, 440 U.S. 147, 153 (1979).

Sanctions have been imposed against Malick for continuing to pursue an action "wholly without merit."[1] Nevertheless, after over seven years of litigation, and several passes up and down the federal court system (including this Court's denial of certiorari and denial of rehearing), Malick continues to occupy the courts' time complaining of the summary judgment which should have

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[1] Judge Schwarzer, for the Northern District of California, warned Malick that any further pursuit of his claim would warrant sanctions. The Ninth Circuit subsequently observed that Malick had been warned, and imposed sanctions for his frivolous appeal.

ended this matter long ago.[2] He now asks this Court to consider whether summary judgment *ever* can be granted, under any circumstances, as a matter of constitutional law.

Malick's petition is brought solely on the abstract question whether summary judgment procedure (Rule 56, Federal Rules of Civil Procedure) intrinsically violates the right to a jury trial under the Seventh Amendment of the United States Constitution. The summary judgment procedure has a long and well-established history within the federal judicial system; for that reason, "it is not surprising that there have been few cases under Rule 56 that have questioned its constitutionality." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* Civil 2d § 2714 (1983) (reviewing historical use of the procedure). The constitutional right to a jury trial arises only when there exists an issue of fact for the jury to decide; summary judgment determines whether there is such an issue. See Appendix I at p. 23a-24a (citing cases).

This Court has closely examined the standard on which a summary judgment may be based, implicitly recognizing the propriety of the summary judgment procedure. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As this Court noted in *Celotex Corp. v. Catrett, supra*:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

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[2] The procedural history described in Malick's current petition is essentially correct, but incomplete. See Procedural History and Contents of Appendix, *infra*, and the appendices (which reflect the courts' decisions at each juncture).

477 U.S. at 327 (*quoting* Fed. R. Civ. Proc. 1).[3]

Malick asserts that Rule 56 is unconstitutional because the precise procedure now used was not employed at common law. The Supreme Court rejected a similar argument in *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322 (1979), observing:

> The Seventh Amendment has never been interpreted in the rigid manner advocated by the petitioners. On the contrary, many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh amendment. See, . . . *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-321 [(1902)] (*summary judgment does not violate the Seventh Amendment*).

439 U.S. at 335 (emphasis added; citations omitted concerning directed verdict and retrial procedures).[4]

Malick's request that the Court reexamine the legitimacy of this long-established procedure is a transparent effort to reopen his case once again, now that nearly every other procedure has been employed to prolong this litigation.

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[3] By now the Court's longstanding endorsement of the Federal Rules should obviate the need to consider Malick's implication that the rules are the work of a devious cabal of judges and lawyers bent on depriving litigants of their common law rights.

[4] Chief Justice (then Justice) Rehnquist came to the same conclusion in his dissent in *Parklane Hosiery*, distinguishnig summary judgment from the procedure in issue (offensive collateral estoppel):

> The procedural devices of summary judgment and directed verdict are direct descendants of their common-law antecedents. They accomplish nothing more than could have been done at common law . . .

439 U.S. at 349-350 (footnote omitted).

CONCLUSION

Sandia respectfully requests that the Court not only deny Malick's petition for a writ of certiorari, but also remand this case with directions to the courts below to employ an effective means to end this seemingly interminable and very costly process.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-83-4836 RHS

ALEXANDER MALICK,
Plaintiff,

vs.

SANDIA CORPORATION,
Defendant.

ORDER

[Filed May 3, 1985]

On August 9, 1984, this Court issued an order denying defendant Sandia's summary judgment motion. On February 15, 1985, this Court: (a) held a hearing on Sandia's motion for reconsideration of the August 9, 1984 order; and (b) took under submission the motion for reconsideration. In the period since the February 15, 1985 hearing, each party has filed supplemental papers in connection with the motion for reconsideration.

In this civil action, plaintiff Malick seeks benefits under Sandia's employee benefit plans. It is undisputed that from 1971 to 1983: (a) Malick performed for Sandia engineering services, under a series of procurement contracts; (b) Malick was paid for those services on an hourly basis and never was paid an annual salary; and (c) Sandia did not concede it was covering Malick under its employee benefit plans.

Indeed, Sandia contends that Malick was an independent contractor, rather than an employee. And regardless

of Malick's status, the Employee Retirement Income Security Act (ERISA) did not require Sandia to cover Malick under any of its employee benefit plans [see 29 U.S.C. § 1052]. However, for purposes of the present order, this Court will assume that Malick was an employee of some sort.

The issue then becomes whether Sandia's employee benefit plans contain language which makes Malick eligible to participate in the plans. In 1980 Sandia restated its 1975 plan and split it into the Retirement Income Plan (hereinafter, "RIP") and the Pension Security Plan (hereinafter, "PSP").

The relevant portion of the 1975 plan defines: (a) "participants" as "employees on roll after June 30, 1975 and prior to July 1, 1974, who were not participants in the 1967 plan"; and (b) "employees" as "those persons who receive regular and stated compensation from the company other than a pension or retainer." However, while Malick was not a 1967-plan participant, it is undisputed that Sandia never classified Malick as a regular employee. And Sandia has presented evidence that Malick was not an "on roll employee," while Malick has presented no evidence to the contrary.

Thus, Malick was not covered under the 1975 plan. Nor was Malick covered under RIP, which applies only to salaried employees, whereas in the joint pretrial statement Malick admitted he was paid an hourly fee and not an annual salary. Of course, PSP can apply to a non-salaried employee. But whether or not Malick's loaded rate is considered, his hourly pay does not come within PSP's Pension Band Conversion Table, so that Malick was outside PSP's coverage.

In view of the inapplicability of Sandia's employee benefit plans to Malick, Malick lacks a meritorious breach-of-contract claim. All of Malick's other claims are based on the proposition that Sandia should have informed him

of his eligibility for employee benefits. However, because there was no such eligibility, these other claims also are unmeritorious.

Thus, this Court hereby: (a) grants the motion for reconsideration; (b) awards summary judgment in Sandia's favor; and (c) dismisses the complaint and this action.

Dated: May 1, 1985

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-83-4836 RHS

ALEXANDER MALICK,
Plaintiff,

vs.

SANDIA CORPORATION,
Defendant.

JUDGMENT

[Filed May 3, 1985]

In accordance with the accompanying order, it is hereby adjudged that the complaint and this civil action are dismissed. Defendant Sandia is entitled to an award of costs.

Dated: May 1, 1985

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-83-4836 R.H.S.

ALEXANDER MALICK,

Plaintiff,

vs.

SANDIA CORPORATION,

Defendant.

ORDER

[Filed Jun. 18, 1985]

The motion of plaintiff Alexander Malick to alter or amend the judgment filed herein on May 3, 1985 having come on for hearing on June 14, 1985; the parties having appeared through their respective counsel; the Court having considered the papers filed in support and in opposition to the motion, having heard oral argument and being fully advised in the premises:

It is hereby *ORDERED* that plaintiff's motion to alter or amend the judgment is in all respects denied.

Dated: 19 June, 1985

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
Judge of the United States
District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2299

D.C. No. CV-38-4836 RHS

ALEXANDER MALICK,
Plaintiff-Appellant,

vs.

SANDIA CORPORATION,
Defendant-Appellee.

MEMORANDUM *

[Filed Sep. 5, 1986]

Appeal from the United States District Court
for the Northern District of California
District Judge Robert H. Schnacke, Presiding

[Submitted August 13, 1986 **—San Francisco]

Before: WRIGHT and FARRIS, Circuit Judges, and RHOADES,*** District Judge

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** Oral argument waived by appellant.

*** Of the Southern District of California.

We are asked to decide whether Malick, an independent contractor, is entitled to benefits under Sandia's ERISA employee benefit plans. The district court granted summary judgment for Sandia and we affirm.

Malick is a professional engineer who worked for Sandia Corp. from 1971 to 1983 under a series of 17 contracts whose duration ranged from six months to five years. Each agreement designated Malick an independent contractor. When he was twice offered an opportunity to be an employee, he rejected the suggestion, saying that he preferred the independence of his contractual relationship.

At Sandia's request, Malick became incorporated in 1977 and thereafter his corporation contracted his services to Sandia. Sandia did not withhold federal income taxes from payments to Malick or his corporation. The agreement between the parties provided that Malick's hourly rate constituted full payment for his professional services. There was no provision for employee benefits.

A new five-year contract in July 1982 called for annual pay rate negotiations. Later that year Malick considered the possibility that he might be a Sandia employee and eligible for some benefits. When he made a demand for them, Sandia asked him to sign a waiver of benefits and reaffirm his independent contractor status and ineligibility for benefits. He refused and his contract was not renewed.

Malick brought suit in October 1983. In December, Sandia told him it would treat the complaint as a claim for benefits. In the following month, Sandia's Employee Benefit Committee found Malick ineligible for benefits and told him he could appeal to the Claim Review Committee within 60 days. He did not do so.

De novo review is our usual standard in summary judgment cases. Eligibility decisions by ERISA trustees are entitled to considerable deference and will not be

reversed absent arbitrary, capricious, or bad faith action or a result unsupported by substantial evidence or erroneous on a question of law. *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922, 927 (9th Cir. 1986).

We decline to debate the question whether federal or state law applies to Malick's claims for benefits and damages. If those were properly dismissed, we need not say which law applies. Nor shall we take the route of remanding for dismissal for failure to exhaust administrative appeals from the committee action.

Summary judgment was proper. There were no factual questions. The committee of trustees did not act arbitrarily or capriciously. The evidence to support the conclusion was not only substantial. It was overwhelming.

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2299

D.C. No. CV-38-4836 RHS

ALEXANDER MALICK,
Plaintiff-Appellant,

vs.

SANDIA CORPORATION,
Defendant-Appellee.

ORDER

[Filed Nov. 13, 1986]

Before: WRIGHT and FARRIS, Circuit Judges, and RHOADES,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for a en banc hearing, and no judge of the court has requested a vote of it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The Memorandum disposition filed on September 5, 1986, is amended as follows:

Page 1, line 14: The opening sentence is changed to read:

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* Of the Southern District of California.

> We are asked to decide whether Malick is entitled to benefits under Sandia's ERISA employee benefit plans.

Page 3, lines 3-4: Delete the sentence, "If those were properly dismissed, we need not say which law applies," and replace with:

> His claims were properly dismissed. Malick was not entitled to relief under either federal or state law.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2299

D.C. No. CV-38-4836 RHS

ALEXANDER MALICK,
Plaintiff-Appellant,

vs.

SANDIA CORP.,
Defendant-Appellee.

AMENDED MEMORANDUM *

[Filed Nov. 13, 1986]

Appeal from the United States District Court
for the Northern District of California
District Judge Robert H. Schnacke, Presiding

[Submitted August 13, 1986 **—San Francisco]
Decided September 5, 1986

Before: WRIGHT and FARRIS, Circuit Judges, and RHOADES,*** District Judge

We are asked to decide whether Malick is entitled to benefits under Sandia's ERISA employee benefit plans. The district court granted summary judgment for Sandia and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** Oral argument waived by appellant.

*** Of the Southern District of California.

Malick is a professional engineer who worked for Sandia Corp. from 1971 to 1983 under a series of 17 contracts whose duration ranged from six months to five years. Each agreement designated Malick an independent contractor. When he was twice offered an opportunity to be an employee, he rejected the suggestion, saying that he preferred the independence of his contractual relationship.

At Sandia's request, Malick became incorporated in 1977 and thereafter his corporation contracted his services to Sandia. Sandia did not withhold federal income taxes from payments to Malick or his corporation. The agreement between the parties provided that Malick's hourly rate constituted full payment for his professional services. There was no provision for employee benefits.

A new five-year contract in July 1982 called for annual pay rate negotiations. Later that year Malick considered the possibility that he might be a Sandia employee and eligible for some benefits. When he made a demand for them, Sandia asked him to sign a waiver of benefits and reaffirm his independent contractor status and ineligibility for benefits. He refused and his contract was not renewed.

Malick brought suit in October 1983. In December, Sandia told him it would treat the complaint as a claim for benefits. In the following month, Sandia's Employee Benefit Committee found Malick ineligible for benefits and told him he could appeal to the Claim Review Committee within 60 days. He did not do so.

De novo review is our usual standard in summary judgment cases. Eligibility decisions by ERISA trustees are entitled to considerable deference and will not be reversed absent arbitrary, capricious, or bad faith action or a result unsupported by substantial evidence or erroneous on a question of law. *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922, 927 (9th Cir. 1986).

We decline to debate the question whether federal or state law applies to Malick's claims for benefits and damages. His claims were properly dismissed. Malick was not entitled to relief under either federal or state law. Nor shall we take the route of remanding for dismissal for failure to exhaust administrative appeals from the committee action.

Summary judgment was proper. There were no factual questions. The committee of trustees did not act arbitrarily or capriciously. The evidence to support the conclusion was not only substantial. It was overwhelming.

AFFIRMED.

APPENDIX E

480 U.S. 935, 94 L.Ed.2d 767

IN THE SUPREME COURT OF THE UNITED STATES

No. 86-1293

ALEXANDER MALICK,
Petitioner,

v.

SANDIA CORPORATION.

Case below, 800 F.2d 263; 804 F.2d 1252.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

March 23, 1987. Denied.

Rehearing Denied May 4, 1987.

See 481 U.S. 1048, 107 S.Ct. 1988.

APPENDIX F

481 U.S. 1043, 95 L.Ed.2d 828

IN THE SUPREME COURT OF THE UNITED STATES

No. 86-1293

ALEXANDER MALICK,
Petitioner,

v.

SANDIA CORPORATION.

Former decision, 480 U.S. 935, 107 S.Ct. 1577.

Case below, 9 Cir., 800 F.2d 263; 804 F.2d 1252.

May 4, 1987. The petition for rehearing is denied.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2299

D.C. No. CV-38-4836 RHS
N.D. Cal.

ALEXANDER MALICK,
Plaintiff-Appellant,
vs.

SANDIA CORPORATION, *et al.*,
Defendant-Appellee.

ORDER

[Filed Sept. 4, 1987]

Before: WRIGHT and FARRIS, Circuit Judges.

The Appellant's Motion to Recall Mandate and to Reconsider and Set Aside Order Granting Summary Judgment, filed on August 21, 1987, has been considered together with the Appellee's Response, filed on August 27, 1987, and is DENIED.

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-89-2765-WWS

ALEXANDER W. MALICK,
Plaintiff,

vs.

SANDIA CORPORATION,
Defendant.

ORDER

[Filed Oct. 31, 1989]

Plaintiff Alexander Malick, proceeding *pro se*, brings this "Independent Action in Equity . . . Fed. Rule Civ. Proc. 60(b)" to vacate a summary judgment entered against him in an earlier action in this court, *Malick v. Sandia*, C-83-4836-RHS. This court has jurisdiction over this independent action because the judgment under attack was entered by this court. *Pacific Ry. of Missouri v. Missouri Pacific Ry. Co.*, 111 U.S. 505, 521-22 (1884); *Narramore v. United States*, 852 F.2d 485, 492 (9th Cir. 1988); *see* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2868 n.23 (1973).

In the earlier action, Malick, who had performed engineering work for Sandia, sought an accounting and damages for fringe benefits and services to which he would have been entitled if he had been an employee of Sandia. Summary judgment was entered against Malick, the judgment was upheld by the Ninth Circuit, certiorari

and rehearing was denied by the Supreme Court, and the Ninth Circuit denied a subsequent Rule 60(b)(1) motion to recall mandate.

Sandia now brings this motion to dismiss based upon *res judicata* and other grounds.

I. Procedural Background

Malick filed his diversity action for breach of contract and fraud on October 13, 1983. The complaint alleged that Malick, who had worked for Sandia as an engineer for twelve years, should have been considered an employee during that period, not an independent contractor, and that he therefore was entitled to benefits under Sandia's employee benefits plan. The complaint sought compensatory and punitive damages. In December of 1983, Sandia's Employee Benefits Committee determined that Malick did not qualify for benefits. Judge Schnacke denied Sandia's motion for summary judgment on August 9, 1984, finding that there were triable issues of fact whether Malick was an employee or an independent contractor. Upon a fully briefed motion for reconsideration, however, Judge Schnacke reversed himself and entered summary judgment against Malick on May 3, 1985. Judge Schnacke determined that even if Malick were considered an employee, he would still not be covered by Sandia's employee benefits plan.

Malick filed a motion to alter or amend judgment, which was denied. He then appealed the judgment to the Ninth Circuit, which affirmed, and which later rejected Malick's petition for rehearing. The Supreme Court denied certiorari. On September 4, 1987 the Ninth Circuit denied Malick's motion to recall mandate and to reconsider.[1]

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[1] According to Sandia, Malick's certiorari petition and the action at bar were filed *pro se*. He was represented by counsel in the other proceedings. (Memo. at 2.)

II. Discussion

Malick contends that the Ninth Circuit "committed an extrinsic mistake which has resulted in an unconscionable affirmation of summary judgment," (Cmpl't at 11) because it based its affirmance of summary judgment on ERISA grounds, and not on the state law causes of action which Malick plead in his original complaint.[2] Malick further contends that he was improperly denied the opportunity to present argument on the issue of the proper standard of review of an ERISA trustee's determination—the issue upon which, he contends, the Ninth Circuit based its decision.

The Ninth Circuit, however, was aware of these contentions and rejected them. In its order denying Malick's petition for rehearing and rejecting his suggestion for a rehearing *en banc*, the Ninth Circuit amended its original order to read: "We decline to debate the question whether federal or state law applies to Malick's claims for benefits and damages. His claims were properly dismissed. Malick was not entitled to relief under either federal or state law. . . . Summary judgment was proper." (Amended Memorandum filed Nov. 13, 1986 at 3.)

In the face of the Ninth Circuit's explicit ruling that Malick was not entitled to relief under state law, and that summary judgment was proper, there is no basis for Malick to contend that the Ninth Circuit improperly ignored his state law claims or improperly based its decision on ERISA grounds. The Ninth Circuit has considered that contention and rejected it, and the Supreme Court has denied certiorari. This Court may not now

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[2] The Ninth Circuit looked to the decision of Sandia's Employee Benefit Committee which found Malick ineligible for benefits, reviewed that decision on an arbitrary or capricious standard, and found that the Committee's conclusion was based on "overwhelming" evidence.

re-examine that same contention.[3] Malick offers no other grounds for vacating the summary judgment, and his action is dismissed. Malick is admonished that the repetitive assertion of a previously adjudicated claim may subject him to sanctions under Rule 11.

IT IS SO ORDERED.

DATED: October 31, 1989

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

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[3] "Under the law of the case doctrine 'a decision of a legal issue or issues by an appellate court . . . must be followed in all subsequent proceedings in the same case . . . unless the evidence on a subsequent trial [is] substantially different. . . .'" Gould v. Mutual Life Ins. Co. of New York, 790 F.2d 769, 774 (9th Cir.), *cert. denied*, 479 U.S. 987 (1986) (citations omitted). "[A] decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court . . . unless . . . controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." Moore v. Jas. H. Matthews and Co., 682 F.2d 830, 834 (9th Cir. 1982) (quoting White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967)). Malick has not alleged anything that would indicate that the Ninth Circuit has subsequently reversed itself on a controlling issue of law, or that its twice-repeated judgment was "clearly erroneous."

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89-16591

D.C. No. CV-89-2765-WWS

ALEXANDER W. MALICK,
Plaintiff-Appellant,

v.

SANDIA CORPORATION,
Defendant-Appellee.

MEMORANDUM *

[Filed Sep. 24, 1990]

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Submitted September 18, 1990 **

Before: GOODWIN, Chief Judge, HUG, and BEEZER, Circuit Judges.

Alexander W. Malick appeals pro se the district court's order dismissing this action as barred on res judicata

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Malick's request for oral argument.

grounds. Malick's action sought to set aside the court's earlier grant of summary judgment in a diversity action for breach of contract and fraud against Sandia Corp., his former employer. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Standard of Review

The district court's dismissal of an action on res judicata grounds is reviewed de novo. *See Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 634 (9th Cir. 1990). A party's entitlement to a jury trial in a federal court is a question of law reviewed de novo. *See Standard Oil Co. of Calif. v. Arizona*, 738 F.2d 1021, 1022-23 (9th Cir. 1984), *cert. denied*, 409 U.S. 1132 (1985).

II. Merits

A. Res Judicata

Malick contends that the district court erred in finding that res judicata barred his action because exceptional circumstances created an "extrinsic mistake" in this court's decision affirming the district court's grant of summary judgment.[1]

"Federal Rule of Civil Procedure 60(b) provides that the rule 'does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.' Fed. R. Civ. P. 60(b). Thus, 'a federal court, in an independent action, has jurisdiction to modify a final judgment in a former proceeding on the ground of mistake . . . .'" *Narramore v. United States*, 852 F.2d 485, 493 (9th Cir. 1988) (quoting *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702, 706 (5th Cir. 1954). Under

[1] Malick also contends that the district court erred in applying the "law of the case" doctrine to this action because the action is separate and independent of the original suit. Because we find that the district court propertly dismissed his action on res judicata grounds, we need not address this contention.

the doctrine of res judicata, however, a final judgment bars further litigation by the same parties on the same cause of action. *See Montana v. United States*, 440 U.S. 147, 153 (1979); *American Triticale, Inc. v. Nytco Serv., Inc.*, 664 F.2d 1136, 1146-47 (9th Cir. 1982) ("[a] judgment in a previous suit is conclusive in a second suit between the same parties or their privies on the same cause of action").

Here, Malick's action alleges that this court committed an "extrinsic mistake" in affirming the district court's grant of summary judgment based on the Employee Retirement Income Security Act (ERISA), and not on the state law claims in his original complaint. This contention is without merit. In our amended memorandum affirming the district court's grant of summary judgment, we explicitly found that all of Malick's "claims were properly dismissed [and that] Malick was not entitled to relief under either federal or state law." *Malick v. Sandia Corp.*, No. 85-2299, amended unpublished memorandum at 3 (9th Cir. No. 13, 1986). Consequently, the district court's finding that our decision had reviewed and rejected Malick's state law claims was correct. Thus, the district court properly held that, absent any other grounds or evidence, it was barred from re-examining those same contentions.

B. Right to a Jury Trial

On appeal, Malick contends that the district court's grant of summary judgment pursuant to Federal Rule of Civil Procedure 56 is unconstitutional because it deprives him of his seventh amendment right to a jury trial. *See* Fed. R. Civ. P. 56. A grant of summary judgment does not violate the seventh amendment right to a jury trial. *See Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d 1072, 1077-78 n.3 (9th Cir. 1986); *see also Plaisance v. Phelps*, 845 F.2d 107, 108 (5th Cir. 1988) ("[t]he function of a jury is to try the material

facts; where no such facts are in dispute, there is no occasion for jury trial. Thus the right to trial by jury does not prevent a court from granting summary judgment"). Therefore, this claim is wholly without merit.

III. Appellate Sanctions

Sandia Corp. requests sanctions against Malick for bringing this appeal. This court has discretion to impose sanctions against litigants, even pro se, for bringing a frivolous appeal. Fed. R. App. P. 38; 28 U.S.C. § 1912; *Wilcox v. Commissioner*, 848 F.2d 1007, 1008-09 (9th Cir. 1988) ($1,500 sanction imposed on pro se litigant for bringing a frivolous appeal). An appeal is frivolous if the results are obvious, or the arguments of error are wholly without merit. *Id.* at 1009 (citation omitted).

Here, the district court warned Malick that his repetitive action were sanctionable. Malick, however, failed to heed the district court's warning. Malick's claims are wholly without merit; accordingly, we impose $500 damages as a sanction.

AFFIRMED.